UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ARDY D. CHADWICK, CDCR #T-13047, Plaintiff, vs. SAN DIEGO POLICE DEP'T, Defendant.	Civil No. 07-2005 DMS (AJB) **ORDER DENYING MOTION TO PROCEED *IN FORMA PAUPERIS* AS BARRED BY 28 U.S.C. § 1915(g) [Doc. No. 2]** **AND** **DISMISSING CIVIL ACTION FOR FAILING TO PREPAY CIVIL FILING FEE REQUIRED BY 28 U.S.C. § 1914(a)**

I.
PROCEDURAL BACKGROUND

Ardy D. Chadwick ("Plaintiff"), a prisoner currently incarcerated at the California Institution for Men ("CIM") in Chino, California, and proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983 in the Central District of California on August 20, 2007. In his Complaint, Plaintiff alleges an undercover police officer with the San Diego Police Department used excessive force and unlawfully arrested him for selling drugs. (*See* Compl. at 2-6.) Plaintiff seeks $3.15 million in damages based on his "false imprisonment" and asks to be released from custody because his "lawyer lie[d] to [him]." (*Id.* at 6.)

On August 23, 2007, United States Magistrate Judge Marc L. Goldman determined that venue was proper in the Southern District of California and transferred this case to this District. *See* Aug. 23, 2007 Mem. & Order Transferring Civil Rights Action at 1-2.

Plaintiff has not prepaid the $350 filing fee mandated by 28 U.S.C. § 1914(a) to commence a civil action; instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

II.

Motion to Proceed IFP

Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2). However, the Prison Litigation Reform Act ("PLRA") amended section 1915 to preclude the privilege to proceed IFP:

> . . . if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief can be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). "This subdivision is commonly known as the 'three strikes' provision." *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter "*Andrews*"). "Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP." *Id.; see also Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter "*Cervantes*") (under the PLRA, "[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP status under the three strikes rule[.]"). The objective of the PLRA is to further "the congressional goal of reducing frivolous prisoner litigation in federal court." *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

"'Strikes' are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed 'on the ground that [they were] frivolous, malicious, or fail[ed] to state a claim." *Andrews*, 398 F.3d at 1116 n.1. Thus, once a prisoner has accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other action IFP in federal court unless he is under "imminent danger of serious physical injury." 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)'s exception for IFP complaints which "make[] a plausible allegation that the prisoner faced 'imminent danger of serious physical injury' at the time of filing.").[1]

While the PLRA does not require a prisoner to declare that § 1915(g) does not bar his request to proceed IFP, *Andrews*, 398 F.3d at 1119, "[i]n some instances, the district court docket records may be sufficient to show that a prior dismissal satisfies at least one of the criteria under § 1915(g) and therefore counts as a strike." *Id.* at 1120. When applying 28 U.S.C. § 1915(g), however, the court must "conduct a careful evaluation of the order dismissing an action, and other relevant information," before determining that the action "was dismissed because it was frivolous, malicious or failed to state a claim," since "not all unsuccessful cases qualify as a strike under § 1915(g)." *Id.* at 1121.[2]

The Ninth Circuit has held that "the phrase 'fails to state a claim on which relief may be granted,' as used elsewhere in § 1915, 'parallels the language of Federal Rule of Civil Procedure 12(b)(6).'" *Id.* at 1121 (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)). *Andrews* further holds that a case is "frivolous" for purposes of § 1915(g) "if it is of little weight or importance" or "ha[s] no basis in law or fact." 398 F.3d at 1121 (citations omitted); *see also*

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[1] The Ninth Circuit has held that section 1915(g) does not violate a prisoner's right to access to the courts, due process or equal protection; nor does it violate separation of powers principles or operate as an ex post facto law. *Rodriguez v. Cook*, 169 F.3d 1176, 1179-82 (9th Cir. 1999); *see also Andrews*, 398 F.3d at 1123 (noting constitutionality of § 1915(g), but recognizing that "serious constitutional concerns would arise if § 1915(g) were applied to preclude those prisoners who had filed actions who were not 'frivolous, malicious, or fail[ing] to state a claim' from proceeding IFP.").

[2] For example, in *Andrews*, the Ninth Circuit specifically found that neither the "dismissal of an appeal for lack of jurisdiction," nor "dismissals of actions brought while the plaintiff was in the custody of the INS" count as strikes under § 1915(g). *Andrews*, 398 F.3d at 1121-22. Nor do dismissed habeas petitions, unless the court makes a determination that the dismissed habeas petition was "little more than a 42 U.S.C. § 1983 action[] mislabeled as [a] habeas petition so as to avoid the penalties imposed by 28 U.S.C. § 1915(g)." *Id.* at 1122 (citing *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997) & n.12. Therefore, where the court's docket of previous cases does *not* reflect the basis for dismissal, the burden shifts to the defendants to "produce court records or other documentation that will allow the district court to determine that a prior case was dismissed because it was 'frivolous, malicious or fail[ed] to state a claim.'" *Andrews*, 398 F.3d at 1120 (citing 28 U.S.C. § 1915(g)). "Once the defendants have met this initial burden, the burden then shifts to the prisoner, who must attempt to rebut the defendants' showing by explaining why a prior dismissal should not count as a strike." *Id.*

Neitzke v. Williams, 490 U.S. 319, 325 (1989) ("[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it lacks an arguable basis in either law or in fact .... [The] term 'frivolous,' when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation."). "A case is malicious if it was filed with the intention or desire to harm another." *Andrews*, 398 F.3d at 1121 (quotation and citation omitted).

III.

APPLICATION OF 28 U.S.C. § 1915(g)

The Court notes as an initial matter that it has carefully reviewed Plaintiff's Complaint and has ascertained that it makes no "plausible allegation" to suggest Plaintiff "faced 'imminent danger of serious physical injury' at the time of filing." *Cervantes*, 493 F.3d at 1055 (quoting 28 U.S.C. § 1915(g)). Therefore, Plaintiff may be barred from proceeding IFP in this action if he has on three prior occasions had civil actions or appeals dismissed as frivolous, malicious or for failing to state a claim. *See* 28 U.S.C. § 1915(g).

A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979). Here, the Court takes judicial notice that Plaintiff has had three prior prisoner civil actions dismissed in the Southern District of California on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A. *See Chadwick v. San Diego Police Dep't,* S.D. Cal. Civil Case No. 01-1343 W (JAH) (Oct. 3, 2001 Order Dismissing action without prejudice for failing to pay filing fees and/or Move to Proceed IFP and sua sponte Dismissing Complaint for failing to state a claim pursuant to 28 U.S.C. § 1915A(b) [Doc. No. 2]) (strike one); *Chadwick v. State of California*, S.D. Cal. Civil Case No. 01-1512 JM (JAH) (Nov. 13, 2001 Order Dismissing action without prejudice for failing to pay filing fees and/or Move to Proceed IFP and sua sponte Dismissing Complaint as frivolous pursuant to 28 U.S.C. § 1915A(b)(1) [Doc. No. 2]) (strike two); and *Chadwick v.*

California Dep't of Corrections, S.D. Cal. Civil Case No. 04-2327 IEG (POR) (Feb. 14, 2005 Order Granting IFP and sua sponte Dismissing Complaint for failing to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(b)(ii) & 1915A(b) [Doc No. 3]) (strike three).[3]

Accordingly, because Plaintiff has, while incarcerated, accumulated three "strikes" pursuant to § 1915(g), and he fails to make a "plausible allegation" that he is under imminent danger of serious physical injury, he is not entitled to the privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) "does not prevent all prisoners from accessing the courts; it only precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status"); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) ("[C]ourt permission to proceed IFP is itself a matter of privilege and not right.").

IV.

Conclusion and Order

For the reasons set forth above, the Court hereby **DENIES** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(g) [Doc. No. 2] and **DISMISSES** the case without prejudice for failure to prepay the full $350 civil filing fee required by 28 U.S.C. § 1914(a).

IT IS SO ORDERED.

DATED: 10-19-07

HON. DANA M. SABRAW
United States District Judge

[3] The Court further notes that Plaintiff was specifically warned in *Chadwick v. California Dep't of Corrections*, S.D. Cal. Civil Case No. 04-2327 IEG (POR), that he had already accumulated two "strikes" under 28 U.S.C. § 1915(g). *See* Feb. 14, 2005 Order at 6 n.3. Morever, the Court notes that the excessive force and unlawful arrest claims presented in Plaintiff's current Complaint appear duplicative of those raised in another civil rights action he first filed in Northern District, but which was also transferred to Southern District of California. *See Chadwick v. San Diego Police Dept.*, S.D. Cal. Civil Case No. 06-2740 IEG (JMA). In that case, Plaintiff was also denied leave to proceed IFP pursuant to 28 U.S.C. § 1915(g). (*See* Jan. 3, 2007 Order [Doc. No. 9].)